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# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 259

GILBERT GREEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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This is a companion case to the *Hall* and *Winston* cases, Nos. 255-258. Petitioner is another of the eleven defendants now on trial in the United States District Court for the Southern District of New York under an indictment based on the Smith Act, 18 U.S.C. (1946 ed.) 10, 13. On June 20, 1949, he was convicted of contempt committed in the presence of the court in the course of the trial, and he was sentenced to imprisonment for the remainder of the trial. The facts relating to the contempt

are set forth in the judgment and certificate (R. 12-16) which the trial judge filed pursuant to Rule 42(a), F. R. Crim. P., as follows:

"On June 20, 1949, at a session of the United States District Court for the Southern District of New York, the defendant Green was on the witness-stand giving testimony on direct examination by his counsel in respect to the charges on trial in *United States* v. *William Z. Foster, et al.*, C 128-87. In the course of the morning session of the Court, the defendant undertook to answer a question which the Court had directed to his counsel, and after several unsolicited remarks by the defendant the Court stated to him:

> 'Why do you keep making these outbursts? There is no question before you and you have been told by me so many times not to do it I should think you could make a special effort and not do it.'

"On the same day, during the afternoon session of the Court, defendant Green's counsel offered a document in evidence. Objection to its admission was sustained. At this juncture the following occurred:

> 'MR. ISSERMAN: I would like to be heard on this, if the Court please. There are five or six or seven different grounds why we deem this article relevant and material to the issues. I would like to be able to state my grounds to the Court.

THE COURT: It seems to me that it represents repetition of the point that has come up in a great variety of ways during the trial here, and I see no necessity for argument.

MR. ISSERMAN: I am asking for an opportunity——

THE COURT: What is that?

MR. ISSERMAN: I am asking for an opportunity to state the grounds.

THE COURT: Yes, I know, but because the question in various forms has so many times arisen here and because of the fact that every time I allow argument the jury is excused and it takes an hour or so before we can calm down again, I find that it is better not to do it. If I felt there was occasion for it I would allow the argument.

MR. ISSERMAN: Can I state for the record my grounds in seeking to have this admitted?

THE COURT: No. I think when a lawyer offers an exhibit, those things are not needed to be stated.

MR. SACHER: Your Honor, this goes to show the intent of this witness. I think that having expressed itself years before the indictment is material.

THE COURT: Mr. Sacher, the intent of these defendants is an intent appearing on the face of the statute and requiring perhaps construction by me, but certainly not an intent as to every detail of every step of everything they do which if we were to stop to have a long statement by

every witness of his intent on everything that he did would unduly prolong the case, and I do not consider it relevant.

MR. SACHER: But Budenz has attacked the intent of every defendant here in regard to democracy and democratic institutions.

THE COURT: Well, Mr. Sacher, I do not desire any argument on this.

MR. ISSERMAN: If the Court please, in respect to this exhibit I would like to make an offer of proof, if I may.

THE COURT: Well, I take the same position that I have previously as to offers of proof. I don't think it is necessary to do it.'

"Immediately, the defendant who had no occasion to speak, turned to the bench and said in an angry, sarcastic manner: 'I thought we were going to be given a chance to prove our case. That article was germane to the very heart of the issue.' The jury was present while defendant Green interrupted the judicial proceedings with his contemptuous statement.

"The misconduct on the afternoon of June 20th was preceded not only by the warning at the morning session of the court, but also by prior misconduct that also had brought forth warnings which had gone unheeded.

"On May 18, 1949, it was necessary to recess the judicial proceedings after the co-defendant Potash had made an outburst in the course of the judicial

proceedings and the defendant Green rose to his feet and commenced talking without the permission of the court. At that time defendant was represented by counsel who was present in the courtroom.

"On May 26, 1949, when the co-defendant Davis similarly rose in the courtroom and commenced an angry outburst in the midst of the judicial proceedings, the Court warned all of the defendants that disorder in the courtroom would not be tolerated. The Court said:

> 'Before you say very much I want to make a little observation. You know, you gentlemen have been bobbing up here, saying things and doing things that I did not consider were very proper to do, some of them rather—well, I won't characterize them because we all remember what you and your other defendants have said and done. This is the first time you have got up. Now I have determined here that I am going to have an orderly trial. I don't think in the early stages that any of you gentlemen really thought I meant what I said or that I would succeed.
>
> * * *
>
> I have penalties at my disposal, if the defendants insist upon interrupting the proceedings and holding forth, although they have lawyers to represent them, and I dislike very much doing some of the

things that the law places it in my power to do.

Now, I just want you to remember that. I believe that the best way to go ahead here is for the defendants to just sit there and let your lawyers represent you instead of jumping up every once in a while to get your own comments in, and your own views, and I tell you, for your own good, that I recommend that.'

"One week later, on June 3, 1949, defendant Green and all his co-defendants, except the defendant Gates, participated in a disturbance in the midst of the judicial proceedings, which led to the conviction for contempt of the co-defendants Hall and Winston. At that time, the Court repeated its warning of May 26th, that 'if there was any further disorder by any of the defendants I should remand them.'

"On June 14, 1949, while the defendant was on the witness-stand, he commenced speaking when he had no occasion to do so. The Court reminded him that his counsel was present and admonished him that he should speak only in answering questions.

"Again, on June 16, 1949, under similar circumstances, defendant Green interrupted colloquy between opposing counsel and the court, and proceeded to make a gratuitous statement. At that time, the Court repeated the admonition to him not to speak 'until a question is put to you.'

"The misconduct on the afternoon of June 20, 1949, was in the teeth of the several prior warnings of the Court and is a part of the pattern of misconduct in which defendant and his co-defendants have engaged for a considerable period of time, as set forth, in part, in the June 8, 1949, orders and certificates in *United States* v. *Henry Winston* and *United States* v. *Gus Hall.*"

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Upon appeal to the Court of Appeals for the Second Circuit, the order of the District Court adjudging petitioner guilty of contempt was affirmed (R. 69).

In this Court, petitioner contends, as do Hall and Winston in the companion cases, that his sentence is so indefinite as to be invalid. For the reasons set forth in our brief in opposition in those cases (pp. 10-12), we submit that the contention is without merit.

Petitioner also argues that his misconduct did not constitute contempt. We think a mere reading of the certificate of the trial judge refutes the contention. As the Court of Appeals observed (R. 68), "This record fairly presents a series of events which if allowed to continue in the court room unchecked might well disrupt the trial and so flout the authority of the court that its effectiveness as an instrument of the judicial process would be much impaired if not destroyed. We think it abundantly clear that the petitioner was guilty of a criminal contempt. *Jones* v. *United States,* D. C.

Cir., 151 F. 2d 289; *Cooke* v. *United States*, 267 U. S. 517."

We respectfully submit that the petition for a writ of certiorari should be denied.

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